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In the Supreme Court of the United States

OCTOBER TERM, 1975

ISRAEL DIAZ-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

EDUARDO BERMUDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL W. FARRELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App.)[1] is reported at 526 F. 2d 89.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1975. A petition for rehearing filed by petitioner Bermudez was denied on January 21, 1976.

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[1]"Pet. App." refers to the appendix to the petition in No. 75-941.

The Bermudez petition for a writ of certiorari (No. 75-6223) was filed on February 17, 1976. Mr. Justice Marshall extended the time for filing the Diaz-Martinez petition for a writ of certiorari to and including January 5, 1976. The Diaz-Martinez petition (No. 75-941) was filed on January 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court erred in permitting petitioner Diaz-Martinez to be cross-examined concerning evidence seized pursuant to an allegedly defective search warrant.

2. Whether the court committed plain error by not instructing the jury *sua sponte* that testimony concerning the evidence seized pursuant to a search warrant that it had held to be defective could be considered only for the purpose of impeachment.

3. Whether petitioner Bermudez' indictment for conspiracy under 21 U.S.C. 846 was insufficient because it did not allege an overt act in furtherance of the conspiracy.

4. Whether there was sufficient evidence before the grand jury to warrant petitioner Bermudez' indictment for conspiracy.

5. Whether certain questions put to petitioner Bermudez' character witnesses on cross-examination were improper and whether the court erred in refusing to permit Bermudez to withdraw one of his character witnesses after the witness's direct examination had been completed.

6. Whether the government knowingly permitted one of its witnesses to testify falsely at trial.

7. Whether the court's instructions to the jury regarding the admissibility of co-conspirator declarations were improper.

8. Whether there was sufficient evidence to support petitioner Bermudez' conspiracy conviction.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners and a co-defendant (Jorge Vivas) were convicted of having conspired to distribute and to possess cocaine, in violation of 21 U.S.C. 846.[2] Petitioners were each sentenced to five years' imprisonment, to be followed by a special parole term of ten years. The court of appeals affirmed (Pet. App.).

The evidence at trial, as summarized by the court of appeals (Pet. App. 30-32), established the existence of a conspiracy involving petitioners and four other persons to sell cocaine from a clothing store owned by petitioner Diaz-Martinez and from a record shop owned by co-defendant Vivas. On November 5, 1973, co-defendant Manuel Fiffe, who was employed by Diaz-Martinez, obtained one ounce of cocaine from Diaz-Martinez and took it to co-defendant Victor Blanco's apartment, where Fiffe sold it to undercover agent Barry Abbott of the Drug Enforcement Administration for $675. Fiffe then returned to the clothing store and gave Diaz-Martinez the money. Three days later, Agent Abbott went to the clothing store and made arrangements to purchase one-eighth of a kilo of cocaine, which Fiffe and Blanco had obtained from Diaz-Martinez. The sale was completed on November 12, 1973, in the basement of the clothing store and the proceeds were again given to Diaz-Martinez (Tr. 226-238, 244, 277-286, 692-702).

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[2]Three other persons indicted with petitioners — Manuel Fiffe, Luis Miranda and Victor Blanco — pleaded guilty and testified at petitioners' trial on behalf of the government (Pet. App. 32).

On November 19, 1973, Agent Abbott informed Blanco that he wanted to purchase an additional one-half kilo of cocaine. Blanco relayed this message to Fiffe, who in turn informed Diaz-Martinez. Since the proposed order was too large for Diaz-Martinez to fill, however, Fiffe approached petitioner Bermudez, whom Fiffe had previously observed "snorting" cocaine with Diaz-Martinez at the clothing store (Tr. 711). Bermudez subsequently met with Fiffe and Blanco to discuss the sale, after which Bermudez took Fiffe to the record shop owned by co-defendant Vivas (Tr. 708-710, 719-723).

On November 20, after having been told by Blanco that additional cocaine was available for sale, Agent Abbott met with Blanco and Fiffe. Abbott accompanied the two men to the record shop, where they were met by Bermudez and Vivas. Although Vivas produced the one-half kilo of cocaine that Agent Abbott had discussed with Blanco, the proposed sale was not completed because Abbott had not brought enough money with him to the meeting (Tr. 290-291, 297-298, 300-301, 339-341, 344-346, 726-730).

On November 29, 1973, Agent Abbott again met with Blanco at Blanco's apartment. Juanita Guzman, who was also employed by Diaz-Martinez, was at Blanco's apartment when Abbott arrived and subsequently informed Abbott that she would attempt to contact Bermudez for him. She also stated, however, that if Abbott wanted to continue to deal in small amounts of cocaine he could obtain them at Diaz-Martinez' clothing store (Tr. 369-370, 373, 379-380). The indictment charging petitioners and their co-defendants with conspiracy to distribute cocaine was returned on May 30, 1974.

ARGUMENT

1. Petitioner Diaz-Martinez first contends (Pet. 15-21) that the court erred in permitting him to be cross-examined concerning certain evidence seized pursuant

to an allegedly defective search warrant. The search in question occurred on March 27, 1974, at the clothing store owned by Diaz-Martinez and resulted in the seizure of various narcotics paraphernalia from the basement of the store. After a hearing, the court suppressed this evidence on the ground that the search warrant that had been secured prior to the search did not sufficiently distinguish the sales area of the store and the basement — where the search was conducted — from the apartments located on the two floors above the store (Tr. 664-665). After Diaz-Martinez had taken the stand at trial and denied any involvement in narcotics transactions, the court permitted the government to ask him about the narcotics paraphernalia found during the search (*e.g.*, Tr. 1420-1421).

Petitioner Diaz-Martinez acknowledges (Pet. 16-18) that evidence not admissible during the government's case-in-chief may nevertheless be admissible "for impeachment purposes after the suspect has taken the stand and testified contrarily to the inculpatory information * * *" (*Oregon* v. *Hass*, 420 U.S. 714, 715; see also *Harris* v. *New York*, 401 U.S. 222, 224-226; *Walder* v. *United States*, 347 U.S. 62). He argues, however, that the present search was so "abusive" and his denial at trial of the truth of the charges against him was so general that the materials seized from the basement of his store should not have been used even for impeachment purposes. These arguments are without merit.

Even assuming that the search of the clothing store owned by Diaz-Martinez was unlawful (which we do not concede) and that evidence seized during an unlawful search might be inadmissible for impeachment purposes if the search was sufficiently "abusive," the court correctly permitted the materials seized from the basement of Diaz-

Martinez' clothing store to be used to impeach his trial testimony. As the court of appeals pointed out (Pet. App. 39 n. 6), if the search that occurred here was unlawful at all, it was unlawful only because of "a technical omission in the warrant description * * *."[3] Indeed, any overbreadth or lack of particularity from which the warrant may have suffered neither jeopardized nor resulted in the infringement of Diaz-Martinez' Fourth Amendment rights. Agents of the Drug Enforcement Administration had probable cause to search the clothing store owned by Diaz-Martinez as well as the basement of the building in which the clothing store was located, and the warrant encompassed those areas. If the warrant arguably permitted the police also to search the apartments above the clothing store, it is difficult to understand how that possibly conferred standing upon Diaz-Martinez to complain about the warrant, since those apartments were never searched (Tr. 607, 613, 627) and Diaz-Martinez did not have, in any event, any interest in those apartments (Tr. 366).

Petitioner's contention that his direct testimony was too general to permit testimony concerning the narcotics paraphernalia seized from the basement of his store to be elicited on cross-examination is similarly insubstantial. Diaz-Martinez testified on direct examination, among other things, that he had never seen cocaine at his clothing

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[3]The search warrant referred to the premises of the "293 Clothing Corporation, 293 Grand Street," a description that did not include the apartments above the clothing store. The government urged on appeal that since there were separate entrances for the clothing store and the apartments and since the character of the building was not externally apparent, the warrant was not overbroad. The court of appeals held (Pet. App. 38-40) that the evidence seized at the clothing store was properly used for impeachment of Diaz-Martinez, and it therefore did not reach the issue of the legality of the search (*id.* at 39 n. 5).

store and that he had never handled, dealt with or sold cocaine or any other drug (Tr. 1333-1334, 1348). The jury was entitled to consider whether the presence of lactose, small plastic bags, a strainer and other materials in the basement of his store (Tr. 1420-1421) was inconsistent with such testimony.

2. Petitioner Diaz-Martinez also contends (Pet. 21-26) that the trial court committed plain error by not instructing the jury *sua sponte* that testimony concerning the evidence seized from the basement of the clothing store could be considered only for the purpose of impeachment. If, as we contend, the search was not illegal, this contention is unavailable. In any event, as the court of appeals noted (Pet. App. 40), the failure of a court to give a limiting instruction has generally been held not to constitute plain error. *E.g., United States* v. *Bozza*, 365 F.2d 206, 214 (C.A. 2), and cases discussed at Wright, *Federal Practice and Procedure, Criminal* §496 (1969). It would be particularly inappropriate to hold in a case such as the present, in which the evidence of petitioner Diaz-Martinez' guilt was overwhelmingly established, that the court's failure to give a limiting instruction not requested by the defense requires the reversal of petitioner's conviction. See Rule 30, Fed. R. Crim. P.; *United States* v. *Urbanis*, 490 F. 2d 384, 386-387 (C.A. 9), certiorari denied, 416 U.S. 944. The evidence seized from the basement of Diaz-Martinez' store was only a small part of the evidence against him at trial; two accomplices, Fiffe and Miranda, testified in detail regarding his role in the conspiracy (*e.g.*, Tr. 688-702, 899-900, 905-908), and on rebuttal an undercover police officer testified that he had dealt directly with Diaz-Martinez in connection with a purchase of cocaine (Tr. 1501-1504).

3. Petitioner Bermudez contends (Pet. 13-34) that the count of the indictment charging him with conspiracy to possess and distribute cocaine was insufficient because it failed to allege an overt act in furtherance of the conspiracy.[4] Unlike the general conspiracy statute (18 U.S.C. 371), however, the statute under which Bermudez was prosecuted (21 U.S.C. 846) does not require that an overt act in furtherance of the conspiracy be alleged or proved.[5] As the court of appeals correctly stated (Pet. App. 34):

> In a case involving an offense under 21 U.S.C. §846, the conspiracy to distribute narcotics is in and of itself a specific crime. Since an indictment is sufficient if it charges the offense in the words of the statute, * * * an indictment under 21 U.S.C. §846 is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, even if it fails to allege any specific overt act in furtherance of the conspiracy. See *United States* v. *Murray*, 492 F.2d 178, 192 (9th Cir. 1973), *cert. denied*, 419 U.S. 854 (1974); *cf. Singer* v. *United States*, 323 U.S. 338 (1945) (Douglas, J.) (no overt act requirement for conspiracy offense under draft evasion statute); *Nash* v. *United States*, 229 U.S. 373, 378 (1913) (Holmes, J.) (same re Sherman Act). Thus, the "overt act" requirement for general conspiracy charges under 18 U.S.C. §371 does not apply where a particular type of conspiracy has, as in the case of 21 U.S.C. §846, been made a specific, substantive offense, *i.e.*, is permissible "on the common law footing." *Nash* v. *United States, supra*, 229 U.S. at 378. * * *

[4]Count 1 of the indictment charged Bermudez and others with a conspiracy to violate 21 U.S.C. 841(a)(1) between October 31, 1973, and May 1, 1974, stating: "It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance." Count 6 charged petitioner Bermudez and a co-defendant also named in the conspiracy count with the substantive offense of possessing with intent to distribute one-half kilogram of cocaine on or about November 20, 1973.

[5]21 U.S.C. 846 provides as follows:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Contrary to petitioner Bermudez' claim (Pet. 13), there is no conflict among the circuits on this issue. Like the Second Circuit, the First, Fifth and Tenth Circuits have specifically held that the allegation of an overt act is not required in an indictment alleging a violation of 21 U.S.C. 846. *United States* v. *DeJesus*, 520 F. 2d 298, 301 (C.A. 1); *United States* v. *Beasley*, 519 F. 2d 233, 247 (C.A. 5); *United States* v. *King*, 521 F. 2d 61, 63 (C.A. 10). In *United States* v. *Williams*, 503 F. 2d 50, 54 (C.A. 6), relied upon by petitioner (Pet. 16-17), the issue was not whether an overt act had to be alleged—or proved—under Section 846, but whether there was sufficient evidence to show an agreement.[6] Petitioner also notes (Pet. 17-18) that the court in *United States* v. *King, supra*, reversed the defendant's conviction because the trial judge had failed to instruct the jury that proof (as distinct from an allegation) of an overt act was essential to conviction under Section 846. But even if *King* was correctly decided, it is of no

[6]Although the *Williams* court "seem[ed] to assume, without discussion" (*United States* v. *DeJesus, supra*, 520 F. 2d at 301) that an overt act must be alleged under Section 846, overt acts were in fact alleged in the indictment and proved in that case; the court found, however, that the acts proved did not sufficiently establish the existence of a conspiracy.

aid to petitioner; the court charged the jury in the present case that an overt act was an essential element of the conspiracy offense with which petitioner had been charged (Tr. 1747, 1795-1796).

4. Petitioner Bermudez also contends (Pet. 34-38) that the grand jury did not have sufficient evidence to warrant his indictment for conspiracy. It is well settled, however, that "[a]n indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge on the merits" and is not "open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury * * * ." *Costello* v. *United States,* 350 U.S. 359, 363; see also *United States* v. *Calandra,* 414 U.S. 338, 345. In any event, petitioner Bermudez concedes (Pet. 35) that Agent Abbott testified at trial in conformity with his grand jury testimony. As noted (see discussion at pp. 3-4, *supra*), Abbott testified at trial to events on November 19, 20 and 29 that directly linked petitioner Bermudez to the conspiracy charged in the indictment.

5. At trial, petitioner Bermudez presented two character witnesses who vouched for his reputation as a law-abiding citizen. Before cross-examining the first of these witnesses, the prosecutor informed the court that he intended to ask the witness whether he had heard that Bermudez had been arrested in New Orleans on June 7, 1974, on a marijuana charge. The court received oral and documentary proof of the arrest (Tr. 1170-1177) and ultimately ruled that the proposed question was proper. Counsel for Bermudez thereupon stated that he wished to "withdraw [the witness] under the circumstances" (Tr. 1188). The court denied this request.

Petitioner Bermudez now contends (Pet. 38-39) that he was not arrested in New Orleans on June 7, 1974, for possession of marijuana, and that the implication to the contrary in the questions objected to by him was therefore unfounded. This contention is directly refuted by the record, which reveals, as noted, that the government submitted both documentary and oral evidence that the arrest had in fact occurred.[7] The court was fully justified in concluding, on the basis of that evidence, that a sufficient basis had been established to permit the government to ask Bermudez' character witnesses about the arrest. See, *e.g., Michelson* v. *United States,* 335 U.S. 469.

Petitioner Bermudez' further contention (Pet. 39) that the court erred in refusing to permit him to withdraw the first of his character witnesses after the witness's direct examination had been completed was not presented to the court of appeals, and he is therefore foreclosed from raising it here. *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 147 n. 2; *Lawn* v. *United States,* 355 U.S. 339, 362-363 n. 16. In any event, since the witness had already testified in detail on direct examination concerning Bermudez' reputation in the community (Tr. 1164-1166), the trial court properly rejected Bermudez' belated request to withdraw the witness.[8] The court carefully instructed the jury both contemporaneously and at the end of trial that the questions concerning Bermudez' arrest on a marijuana charge could be considered only as they related to his reputation and not as evidence that he had been arrested (Tr. 1198, 1726).

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[7]The evidence of the arrest produced by the government included a record from the District Attorney in New Orleans showing that Bermudez had been arrested on June 7, 1974, on charges of possession or conspiracy to possess marijuana (Tr. 1176). Petitioner's assertion (Pet. 38) that "there was no evidence whatever * * * to show that there was any talk, rumor or report that [he] had been so 'arrested' " is irrelevant. A question put to a character witness in good faith is the proper means of ascertaining whether such reputation exists in fact. *Michelson* v. *United States,* 335 U.S. 469.

[8]Petitioner suggests (Pet. 39) that he was "surprised" by the question concerning his prior arrest on a marijuana charge and therefore could not anticipate it in deciding whether to call the character

6. Petitioner Bermudez also contends (Pet. 40-43) that the government knowingly permitted one of its witnesses, Manuel Fiffe, to testify falsely that on November 19, 1973, Victor Blanco had told him of Agent Abbott's interest in purchasing one-half of a kilo of cocaine, and that he and Blanco had approached Diaz-Martinez and Bermudez to arrange for the purchase. The government elicited this testimony, Bermudez argues, knowing that Agent Abbott had previously testified that he had not discussed the half kilo purchase with Blanco until the afternoon of November 20, 1973.

Fiffe's testimony incriminating Bermudez did not depend, however, upon whether he had learned prior to November 20 that Abbott was seeking to purchase one-half of a kilo of cocaine. Fiffe testified—fully corroborating Abbott's testimony in this regard—that on November 20 Abbott, Fiffe and Blanco met with Vivas and Bermudez (the "boss") at Vivas' music shop to negotiate the purchase of one-half kilo of cocaine (Tr. 723-731). Any discrepancies between Fiffe's and Agent Abbott's testimony concerning evidence of the conspiracy prior to November 20 were matters of detail that Bermudez was free to explore on cross-examination of Fiffe (see Tr. 746-825). Indeed, the prosecution provided Bermudez with additional material for cross-examination by notifying the court and counsel after Fiffe's testimony on direct that Blanco (whom the government did not call as a witness) had told

witnesses. But petitioner knew that he had been arrested in New Orleans on June 7, 1974, on charges, and in the company of persons, other than those involved in the instant case (Tr. 1173). His trial counsel also knew of his arrest on that date (Tr. 1171). Moreover, the question related to an arrest that had occurred only four months before trial in this case.

the F.B.I. that he could not recall a meeting with Fiffe on November 19 (Tr. 734).[9]

7. Petitioner Bermudez next contends (Pet. 47) that the trial court "failed to make the predicate ruling of the existence of a conspiracy involving Bermudez" before admitting Agent Abbott's testimony as to the acts and declarations of alleged co-conspirator Blanco. However, the court was not required to make such a "ruling." Instead, it instructed the jury both during trial and in its

[9]Petitioner Bermudez further suggests (Pet. 43-44) that the prosecutor improperly asked Fiffe a question designed solely to "paint [Bermudez] as a cocaine user." After establishing that Fiffe had known Bermudez, the prosecutor asked Fiffe if he had even seen Bermudez in the company of petitioner Diaz-Martinez, to which Fiffe replied: "[S]ometimes when Mr. Bermudez would come to the store, Mr. Diaz-Martinez would be in his office in the back of the store, and the customers would go to that back room to have a drink with him or to sniff a little" (Tr. 710). Defense counsel's motion to strike the answer as not responsive was denied, whereupon the prosecutor asked: "Did you ever see Mr. Diaz-Martinez and Mr. Bermudez sniff cocaine together?" (Tr. 711). Fiffe responded, "Once or twice" (*ibid.*). Counsel did not object to this question or to further inquiry about the "sniffing" (*ibid.*). The testimony concerning petitioners' joint use of cocaine was admissible to explain Fiffe's testimony that he turned to Bermudez as a supplier of the one-half kilo of cocaine requested by Agent Abbott immediately after having approached Diaz-Martinez for it, therefore tending to prove a single conspiracy involving both Diaz-Martinez and Bermudez.

Bermudez' claim (Pet. 44-47) that the prosecutor led Fiffe to change his testimony so as mistakenly to place Bermudez at Vivas' record shop on November 20, rather than at Vivas' "house," is insubstantial. Fiffe, testifying in Spanish through an interpreter, stated that before accompanying Abbott and Blanco to Vivas' store, he had called Bermudez' home and learned that he was at Vivas' "casa," which was originally translated as "house". In response to the prosecutor's clarifying question, Fiffe explained that "casa" meant Vivas' place of business rather than his house (Tr. 721). The point is in any event without significance, since the parties went immediately to Vivas' store, where they met Bermudez (Tr. 297-298).

final charge that Blanco's acts and statements could be considered against the defendants only when the jury had found by independent evidence that a conspiracy existed and that the individual defendants were members of it (Tr. 213-224, 1743-1744).[10] As the court of appeals held (Pet. App. 42-43), these instructions correctly stated the law.

8. Finally, petitioner Bermudez contends (Pet. 48-49) that the evidence was insufficient to show his participation in the conspiracy charged in the indictment. As shown in the Statement, however, there was ample evidence from which the jury could conclude that Bermudez was part of a single continuing conspiracy to distribute cocaine. Petitioner's claim that the evidence showed that the "[Diaz-Martinez] group" had ceased selling cocaine by November 12 ignores the fact, for example, that Fiffe and Blanco were not aligned with any "group," but participated in both the Diaz-Martinez and Bermudez-Vivas sales to Agent Abbott and that Diaz-Martinez' employee, Juanita Guzman, stated as late as November 29 that Abbott could purchase additional cocaine from either Bermudez or Diaz-Martinez.[11]

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[10]Even if it is assumed that a trial court must determine as a preliminary matter whether there is sufficient independent proof of a conspiracy justifying the admission of out-of-court statements of co-conspirators (see, *e.g.*, *United States* v. *Sanders*, 463 F. 2d 1086, 1088 (C.A. 8), that determination is necessarily implicit in any decision made by the court to permit the jury (properly instructed) to consider the out-of-court statements and in its ultimate refusal, as here, to disturb the jury's verdict.

[11]Petitioner is mistaken in stating (Pet. 49) that the government represented to the trial court that the conspiracy charged in the indictment had ended on November 12, 1973. The government's representation (Tr. 733-734) was only that Blanco had stated that he could not recall having attended a meeting with Fiffe and Bermudez on November 19.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL W. FARRELL,
Attorneys.

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